T DEVINDRAN N THATCHNAMURTHY

v.

KERAJAAN NEGERI JOHOR & ORS

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL SUIT NO: 22-5-1996]
2 JULY 2004

CIVIL PROCEDURE: *Consent order - Setting aside - Counsel's lack of authority to enter consent order - Whether sufficient grounds for setting aside order - Whether order could be set aside if in the interests of justice*

The plaintiff was removed as the registered and legal owner of a certain land ('the said land') on account of three consent orders. The plaintiff in this action applied to have himself declared as the registered and legal owner of the said land. He alleged that the counsel acting for him at the material time had exceeded his authority. He claimed that his initial action to remove a registrar's caveat on the said land that had led to the consent orders, could not have turned into (even if counsel had implied authority) any authority to consent to his registered interest being removed.

Before trial proper, the parties agreed to a preliminary issue being tried, ie, that on the assumed basis that counsel had no authority to enter the consent orders, whether the absence of authority was a sufficient ground in law to set them aside.

Held (ruling preliminary issue in favour of plaintiff):

[1] The agreed preliminary issue was purely a question of law that could be answered without any prior finding of fact. All that was required to be produced in any of the bundles of documents were the said consent orders. By the terms of the agreed preliminary issue, it is to be assumed that counsel had no authority to enter the consent orders. There was no question of fact to be resolved and all argument that counsel was *ad idem* was a question of fact that could not be heard in the trial of the agreed preliminary issue. Implied authority had been ousted by the terms of the agreed preliminary issue. (pp 545 c-f & 548 e)

[2] The general principal is that a consent order once sealed cannot be set aside by the court at first instance in the original action but may be set aside in a fresh action brought for that purpose. The exceptions are where there has been a slip in drawing up the order which was entered and where there has been an error in expressing the manifest intention of the court. Absence of consent was also held as an exception to the general principle. Even if lack of consent was unknown to the other side, the court had the power to interfere with such a consent order where grave injustice would be caused by allowing it to remain. (pp 549 a-e & 550 d)

[3] This court would not interfere on the ground that a consent order once sealed cannot be set aside by the court of first instance in the original action on account of procedure. But this action was a fresh action and the issue that the consent orders had been perfected and that the court should not interfere was a non-starter. The pertinent issue was whether the absence of authority is a ground for setting aside a consent order. Be it at first instance or be it in a fresh action, the authorities have shown that the authority of counsel or want of it is a good ground for setting aside a consent order. (pp 551 g-h & 552 a)

[It was further ordered that all pleaded issues be tried.]

Case(s) referred to:

Ainsworth v. Wilding [1896] 1 Ch 673 ***(refd)***
Bank of China v. Maria Chia Sook Lan [1976] 1 MLJ 41 ***(refd)***
Camden London Borough Council v. Medhurst (Chancery Division) 3 May 2001 ***(refd)***
Cannan v. Reynolds [1856] 5 El & BI 301 ***(refd)***
Cheah Wong Nyan & Cheah Sin Kee v. KALRM Palaniappa & Ors [1935] MLJ 31 ***(refd)***
Chee Kua Cheng v. Chuo Kong Kah [1967] 2 MLJ 74 ***(refd)***
Ganapathy Chettiar v. Lum Kum Chum & Ors [1978] 2 MLJ 145 ***(refd)***
Huddersfield Banking Company Ltd v. Henry Lister & Sons Ltd [1895] 2 Ch 273 ***(refd)***
Khaw Poh Chhuan v. Ng Gaik Peng & Ors [1996] 2 CLJ 185 SC ***(refd)***
Lee Teng Siong v. Lee Geok Thye Holdings Sdn Bhd [2003] 4 CLJ 834 HC ***(refd)***
Leow Seng Huat v. Low Mui Yein [1996] 2 BLJ 466 HC ***(refd)***
Marsden v. Marsden [1972] 2 All ER 1162 ***(refd)***
Mullins v. Howell [1879] 11 Ch D 763 ***(refd)***
Neal v. Gordon Lennox [1902] AC 465 ***(refd)***
Oley and Moffat v. City of Fredericton [1983] 50 NBR (2d) 196 ***(refd)***
Paper Machinery Ltd et al v. Ross Engineering Corp et al [1934] 2 DLR 239 ***(refd)***

Purcell v. FC Trigell Ltd [1970] 3 All ER 671 ***(refd)***
Re Australian Direct Steam Navigation Co, Miller's Case [1876] 3 Ch D 661 ***(refd)***
Richard Lau Ming Hing v. Bank Pembangunan Malaysia Bhd [1994] 2 CLJ 849 HC ***(refd)***
S Pakianathan v. RK Stallard [1979] 2 MLJ 251 ***(refd)***
Siebe Gorman & Co Ltd v. Pneupal Ltd [1982] 1 All ER 377 ***(refd)***
Stewart v. Complex [1990] 107 NBR 407 ***(refd)***
Tio Chee Hing v. Tractors Malaysia Bhd [1973] 2 MLJ 66 ***(refd)***
Tioner-Roche & Co (London) Ltd v. Spiro 17th June 1982 ***(refd)***
Tong Lee Hwa & Anor v. Chin Ah Kwi [1971] 2 MLJ 75 ***(refd)***
Waitemata City Council v. MacKenzie [1988] 2 NZLR 242 ***(refd)***
Wembley Laboratories Ltd v. Joyce Ground Engineering Ltd QBD (Official Referees' Business) 19 Con LR 143 ***(refd)***
Yap Chee Meng v. Ajinomoto (Malaysia) Bhd [1978] 2 MLJ 249 ***(refd)***

For the plaintiff - K Periasamy; M/s Peri & Assoc
For the 1st defendant - Iskandar Ali Dewa
For the 2nd defendant - Joginder Singh; M/s Joginder Singh & Co
For the 3rd defendant - Porres Royan; M/s Shook Lin & Bok

Reported by Usha Thiagarajah

JUDGMENT

Jeffrey Tan J:

As stated by the statement of claim, this is an action by the plaintiff to have himself declared as the registered and legal owner of land held under H.S. (M) 8222 for Lot 5545 Mukim of Kluang, District of Kluang, Johore Darul Takzim (hereinafter referred to as the said land). It should be mentioned, that at one point the plaintiff was the registered proprietor of the said land, but was removed as registered proprietor on account of the following three "consent" orders of court. The other pertinent background facts would be disclosed in the course of this judgment.

DALAM MAHKAMAH TINGGI MALAYA DIMUAR

U.P No. 25-21 Tahun 1992

Dalam perkara mengenai Seksyen 321(3)c Kanun Tanah Negara 1965

Dan

Dalam perkara mengenai kegagalan Pendaftar Tanah membatalkan Kaveat Pendaftaran ke atas tanah yang terkandung dalam H.S.(M) 8222 Lot 5545, Mukim Kluang, Johor.

Dan

Dalam perkara Aturan 55 Kaedah 13
Kaedah-kaedah Mahkamah Tinggi 1980

Antara

T. Devindran a/l N. Thatchnamurthy Plaintif

Dan

1. Kerajaan Negeri Johor
(Bahagian Pejabat Tanah Kluang)

2. Santa Singh a/l Chanan Singh Defendan

DIHADAPAN YANG ARIF
TUAN RICHARD TALALLA
HAKIM, MAHKAMAH TINGGI,
MUAR

DALAM MAHKAMAH TERBUKA
PADA 24HB. MARCH 1993

PERINTAH PERSETUJUAN

Tindakan ini telah dipanggil untuk pengawasan pada hari ini dengan kehadiran Encik Allen Yu Peguamcara Plaintif dan Encik Abdul Kahar bin Kamari bagi Defendan Pertama dan Encik Gurunarapal Singh Peguamcara Defendan Kedua.

DENGAN PERSETUJUAN PIHAK-PIHAK ADALAH DENGAN INI DIPERINTAHKAN:

1. Bahawa Usul Pemula ini ditarik balik;

2. Bahawa dalam tempoh empat bulan daripada tarikh perintah ini defendan pertama hendaklah mengambil tindakan memperbetulkan catatan hakmilik ke atas tanah H.S. (M) 8222 Lot 5545 Mukim Kluang, Johor kepada kedudukannya yang asal tanpa menjejaskan hak plaintif untuk apa-apa remedi yang akibat daripada pembetulan ini; dan

3. Selanjutnya tiada perintah untuk kos

Bertarikh 24hb. Mac 1993
t.t.
PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI MUAR

DERAF USUL KELULUSAN

t.t.
ALLEN YU & CO.

PENASIHAT UNDANG-UNDANG
NEGERI JOHOR

SUCHA SINGH & PARTNERS

DALAM MAHKAMAH TINGGI MALAYA DIMUAR
SAMAN PEMULA NO. 24-268-TAHUN 1993

Dalam perkara mengenai Seksyen-seksyen 340 dan 7 Kanun Tanah Negara 1965.

Dan

Dalam perkara mengenai tanah yang dipegang dibawah hakmilik H.S. (M) 8222 Lot 5545, Mukim Kluang, Johor yang asalnya dipegang dibawah hakmilik SS 2/24 Kluang.

Dan

Dalam perkara mengenai Perintah Persetujuan Mahkamah Tinggi Muar bertarikh 24hb Mac 1993 besabit Mahkamah Tinggi Usul Pemula No. 25-21-1992.

Dan

Dalam perkara Aturan 92, Kaedah 4, kaedah-kaedah Mahkamah Tinggi 1980

DI ANTARA

KERAJAAN NEGERI JOHOR (PENDAFTAR HAKMILIK JOHOR) PLAINTIF

DAN

1. T. DEVINDRAN a/l Thatchnamurthy
2. GORDIPOR a/p DOLA SINGH
3. SANTA SINGH a/I CHANAN SINGH DEFENDAN-DEFENDAN

DIHADAPAN YANG ARIF TUAN LOW HOP BING PESURUHJAYA KEHAKIMAN MAHKAMAH TINGGI MUAR

DALAM MAHKAMAH TERBUKA PADA 23HB JULAI 1994

PERINTAH PERSETUJUAN

Tindakan ini telah dipanggil untuk dibicara pada hari ini dengan kehadiran Encik Abdul Rashid bin Sudin Peguamcara bagi pihak Plaintif; Encik Allen Yu Peguamcara bagi Defendan Pertama dan Encik Sucha Singh Peguamcara bagi Defendan Ketiga dan dengan tanpa kehadiran Defendan Kedua walaupun Saman Pemula tindakan ini telah diserahkan kepadanya. DENGAN

PERSETUJUAN PIHAK PLAINTIF, DEFENDAN PERTAMA DAN DEFENDAN KETIGA DAN TANPA KEHADIRAN DEFENDAN KEDUA ADALAH dengan ini DIPERINTAH bahawa:

1. Bahawa semua memorial Pindahmilik atas Suratan Hakmilik HS (M) 8222; Lot 5545, Mukim Kluang, Johor Darul Takzim kepada Gordipor a/p Dola Singh K/P 2337110 sebagai pentadbir dan pemilik melalui Journal No: 348/90 Transmission Jilid 8, Folio: 17, bersabit PTDK (SED) 58/87 bertarikh 27/5/90 dibatalkan.

2. Bahawa memorial pindahmilik Jilid 108; Folio: 36 Peserahan No. 2859/91 daripada Gordipor a/p Dola Singh kepada T. Devindran a/l N. Thatchnamurthy K/P 8283267 bertarikh 12/10/91 dibatalkan.

3. Bahawa plaintif diberi kebenaran untuk membuat pembetulan yang sewajarnya kepada suratan Hakmilik HS (M) 8222; Lot 5545, Mukim Kluang, Johor Darul Takzim dengan memulih dan mengembalikan *status quo* hakmilik asal dengan memasukkan nama Pentadbir Harta Pesaka Maghi Singh ke atasnya.

4. Bahawa Defendan Pertama hendaklah menyerahkan Suratan Hakmilik HS(M) 8222; Lot 5545; Mukim Kluang Johor Darul Takzim kepada Pentadbir Tanah Kluang untuk dibetulkan.

5. Bahawa selepas pembetulan ke atas hakmilik HS (M) 8222; Lot 5545; Mukim Kluang Johor Darul Takzim dilaksanakan. Suratan Hakmilik tersebut diserahkan kepada peguambela Tetuan Sucha Singh & Partners untuk tindakan mereka selanjutnya.

6. Bahawa Perintah tersebut diberi tanpa menjejaskan hak Defendan Pertama untuk apa-apa remedi, akibat daripada pembetulan ini.

7. Tiada perintah untuk kos.

8. Lain-lain arahan yang dianggap sualmanfaat oleh Mahkamah yang mulia ini.

Bertarikh 23 haribulan Julai 1994

t.t.
TIMBALAN PENDAFTAR
MAHKAMAH TINGGI MUAR

DALAM MAHKAMAH TINGGI MALAYA DIMUAR
SAMAN PEMULA NO. 24-268-TAHUN 1993

Dalam perkara mengenai Seksyen-seksyen 340 dan 417 Kanun Tanah Negara 1966.

Dan

Dalam perkara mengenai tanah yang dipegang dibawah Hakmilik HS (M) 8222; Lot 5545; Mukim Kluang, Johor yang asalnya dipegang di bawah Hakmilik SS 2/24 Kluang.

Dan

Dalam perkara mengenai Gadaian Perintah Persetujuan Mahkamah Tinggi Muar bertarikh 24hb. Mac, 1993 berthabit Mahkamah Tinggi Muar Usul Pemula No. 25-21-1992

Dan

Dalam perkara Aturan 92, Kaedah 4, Kaedah-Kaedah Mahkamah Tinggi 1980.

DI ANTARA

KERAJAAN NEGERI JOHOR
(PENDAFTAR HAKMILIK JOHOR) PLAINTIF

DAN

T. DEVINDRAN a/l LN. THATCHNAMURTHY
GORDIPOR a/p DOLA SINGH
SANTA SINGH a/l CHANAN SINGH DEFENDAN-DEFENDAN

DIHADAPAN YANG ARIF TUAN LOW HOP BING
HAKIM MAHKAMAH TINGGI MUAR

DALAM KAMAR
PADA 23HB SEPTEMBER 1995

PERINTAH PERSETUJUAN

Tindakan ini telah dipanggil untuk dibicara pada hari ini dengan kehadiran Encik Abdul Rasid bin Sudin Peguamcara bagi pihak Plaintif, Encik Allen Yu Peguamcara Defendan Pertama dan Encik Sucha Singh Peguamcara bagi Defendan Ketiga dan dengan tanpa kehadiran Defendan Kedua walaupun Saman Pemula tindakan ini telah serahkan kepadanya, DENGAN PERSETUJUAN PIHAK PLAINTIF, DEFENDAN ADALAH dengan ini DIPERINTAHKAN bahawa:

1. Bahawa semua memorial Pindahmilik atas Suratan Hakmilik HS (M) 8222; Lot 5545; Mukim Kluang, Johor Darul Takzim kepada Gordipor a/p Dola Singh k/p 2337110 sebagai pentadbir dan pemilik melalui Journal No: 348/90 Transmission Jilid 8, Folio: 17, bersabit PTDK (SED) 58/87 bertarikh 27/5/90 dibatalkan.

2. Bahawa memorial pindahmilik Jilid 108; Folio: 36 Perserahan No. 2859/91 daripada Gordipor a/p Dola Singh kepada T. Devindran a/l N. Thatchnamurty k/p 8283267 bertarikh 12/10/91 dibatalkan.

3. Bahawa plaintif diberi kebenaran untuk membuat pembetulan yang sewajarnya kepada Suratan Hakmilik HS (M) 8222; Lot 5545; Mukim Kluang Johor Darul Takzim dengan memulih dan mengembalikan *status quo* hakmilik asal dengan memasukkan nama Maghi Singh ke atasnya.

4. Bahawa Defendan Pertama hendaklah menyerahkan Suratan Hakmilik HS (M) 8222; Lot 5545; Mukim Kluang Johor Darul Takzim kepada Pentadbir Tanah Kluang untuk dibatalkan.

5. Bahawa pengendorsan Pentadbir Tanah Kluang bertarikh 6 Ogos 1994 dalam Suratcara Hakmilik Keluaran dan Daftaran (Issue and Register Document of Title) tersebut dibatalkan.

6. Bahawa Plaintiff tersebut diberi tanpa menjejaskan hak Defendan Pertama untuk apa-apa remedi, akibat daripada pembetulan ini.

7. Tiada perintah untuk kos.

8. Lain-lain arahan yang dianggap suaimanfaat oleh Mahkamah yang mulia ini.

Bertarikh 23 haribulan September, 1995.

t.t
PENOLONG KANAN PENDAFTAR
MAHKAMAH TINGGI
MUAR

In his opening address, Mr. Periasamy for the plaintiff characterized this action as "a suit to set aside" the aforesaid "consent" orders. He contended that the aforesaid "consent orders" were entered without the consent of the plaintiff. Then learned counsel informed that all parties had agreed (later confirmed by all other counsel) to a trial of the following preliminary issue, to wit, "on the assumed basis that the 3rd defendant had no authority to enter into the aforesaid consent orders dated 24 March 1993, 23 July 1994, and 23 September 1995, is the absence of authority sufficient ground in law to set aside or nullify those said orders", and that all parties had further agreed (later confirmed by all other counsel) that the entire action shall stand to be dismissed if the aforesaid agreed preliminary issue were not answered in favour of the plaintiff, but that all

pleaded issues shall stand to be tried if the aforesaid agreed preliminary issue were resolved in favour of the plaintiff. Learned counsel also related that all parties had agreed (later confirmed by all other counsel) to rely solely on legal submission to dispose of the agreed preliminary issue. Again later on, all counsel informed the court that encl. 70 is a statement of agreed facts as between the plaintiff and 2nd defendant and 3rd defendant, that encl. 86 is a bundle of agreed documents as between the plaintiff and 3rd defendant, that encl. 85 is a bundle of agreed documents as between the plaintiff and 2nd defendant, that encl. 57 (later marked as PB) is the plaintiff's bundle of documents, that encl. 91 (later marked as D2B) is the 2nd defendant's bundle of documents, and, that encl. 62 (later marked as D3B) is the 3rd defendant's bundle of documents.

Mr. K. Periasamy conceded that the plaintiff had appointed the 3rd defendant, an advocate & solicitor, to act for the plaintiff in Muar 25-21-92. But with regard to the other 2 orders, Mr. Periasamy contended that the plaintiff had not appointed the 3rd defendant to act for the plaintiff in Muar 24-268-94. Mr. Periasamy indicated that he would want to adduce oral evidence, to which Mr Porres Royan for the 3rd defendant said he would not object, to prove that the plaintiff had not appointed the 3rd defendant to act in Muar 24-268-94, notwithstanding the agreement of the parties to dispense with all oral evidence in the trial of the preliminary issue. But Mr Periasamy promptly abandoned his plan to adduce such oral evidence after it was pointed out by Mr. Joginder Singh for the 2nd defendant that it was not pleaded by the plaintiff that he (plaintiff) had not appointed the 3rd defendant to act in Muar 24-268-94. Mr. Periasamy then said that "at the material time when order dated 23 July 1994 in Muar 24-268-93 was entered, the 3rd defendant was appointed by the plaintiff as the solicitor for the plaintiff" but that the 3rd defendant had exceeded his authority. Mr. Periasamy then submitted as follows. In Muar 25-21-92, the instant plaintiff had sought to remove the caveat of the registrar. On 24 March 1993 in Muar 25-21-92, an order was entered, whereby that action was discontinued. Muar 24-268-93 "was made pursuant to the order dated 24 March 1993 in Muar 25-21-92". But in Muar 24-268-93, the registered interest of the plaintiff in the said land was erased; on 23 September 1994 in Muar 24-268-93, an order was entered, whereby the registered interest of the plaintiff was "removed". "It (Muar 25-21- 92) started as an action to remove a caveat. It (the authority to the 3rd defendant) could not (have) turned into, even if the 3rd defendant had any implied authority, any authority to consent to (the plaintiff's) registered interest being removed." An order entered without authority or in excess of authority may be set aside (in support, counsel cited *S. Pakianathan v. R.K. Stallard* [1979] 2 MLJ 251, 253, and *Marsden v. Marsden* [1972] 2 All ER 1162). Where grave injustice would otherwise befall on an innocent party, the court has a discretionary power to set aside the consent order.

Mr. Joginder took no time to distinguish that the court in *Marsden v. Marsden* was informed that an application would be made to set aside the consent order even before the consent order was perfected. It was not so in the instant case. The order dated 24 March 1993 in Muar 25-21-92 was perfected on 27 June 1993 (see D2B6), while the order dated 29 September 1995 in Muar 24-268-93 was perfected long before the present action was filed on 18 January 1996. Mr. Joginder further called attention to the fact that the instant plaintiff was present in court when all three consent orders were entered. Mr. Joginder was then interrupted by Mr. Periasamy who only stood up to further concede that the instant plaintiff was present in court when the order dated 29 September 1995 in Muar 24-268-93 was entered. With that latter admitted fact, Mr. Joginder resumed his submission as follows. With presence of the plaintiff in court when the order dated 23 September 1995 was entered, the plaintiff could not contend that there was no authority. Absence of authority will not set aside a consent order (in support, counsel cited *Lee Teng Siong v. Lee Geok Thye Holdings Sdn. Bhd.* [2003] 4 CLJ 834, and *Leow Seng Huat v. Low Mui Yein* [1996] 2 BLJ 466).

Mr. Porres Royan laid forth the pertinent facts in *Khaw Poh Chhuan v. Ng Gaik Peng & Ors* [1996] 2 CLJ 185. The consent order in that case, he said, was set aside as one of parties bound by that consent order was not a party to the proceeding that purported to dispose of his interest without his knowledge and consent. Mr. Royan ended his short submission with a brief citation of *Leow Seng Huat v. Low Mui Yein (supra)* at 381, and *Bank of China v. Maria Chia Sook Lan* [1976] 1 MLJ 41, 48.

Mr. Iskandar Ali Dewa for the 1st defendant began by saying that the 1st defendant reserves the right to challenge the propriety of the instant action, even if the agreed preliminary issue were answered in favour of the plaintiff. Learned federal counsel then adopted the arguments of Mr. Joginder and Mr. Royan, and submitted as follows. There is no ground sufficient to set aside the consent order. The plaintiff was represented throughout. The 1st defendant had no reason to suspect anything amiss. The 1st defendant had no notice of any absence of authority. Limitation of authority must be brought to the notice of the opposing party (in support, Federal Counsel cited *Richard Lau Ming Hing v. Bank Pembangunan Malaysia Berhad* [1994] 2 CLJ 849). The defendants were never put on enquiry. A consent order may be set aside for the reasons sufficient to set aside an agreement (in support, federal counsel cited *Tio Chee Hing v. Tractors Malaysia Bhd.* [1973] 2 MLJ 66, and *Tong Lee Hwa & Anor v. Chin Ah Kwi* [1971] 2 MLJ 75). Lack of authority is not a sufficient ground. Fraud and collusion are the only grounds to set aside a consent order (federal counsel cited *Cheah Wong Nyan & Cheah Sin Kee v. K.A.L.R.M. Palaniappa & 2 Ors* [1935] MLJ 31). Mistake, undue influence, misrepresentation are further

grounds (federal counsel cited *Ganapathy Chettiar v. Lum Kum Chum & Ors* [1978] 2 MLJ 145, *Yap Chee Meng v. Ajinomoto (Malaysia) Berhad* [1978] 2 MLJ 249, and *Chee Kua Cheng v. Chuo Kong Kah* [1967] 2 MLJ 74). Lack of authority has never been a ground and has never been accepted as a ground to set aside a consent order.

The reply of Mr. Periasamy was that the instant plaintiff had no knowledge of the orders until the last order was entered. "The effect of the consent order is dire." The plaintiff lost his land on account of his application to set aside a caveat lodged against his land. On the authority of *Marsden v. Marsden*, the absence of authority is a ground to set aside a consent order.

Given those submissions, it would appear that the implication of the agreed preliminary issue was not fully appreciated. In the first place, it should be recognised that the agreed preliminary issue is purely a question of law, a question of law that could be answered without any prior finding of fact. All that was required to be produced in any of the bundles of documents were the said consent orders. The reason is simple. By the terms of the agreed preliminary issue, it (the only primary fact), is to be assumed, *ex hypotesi*, that "the 3rd defendant had no authority to enter into the aforesaid consent orders dated 24 March 1993, 23 July 1994, and 23 September 1995". Hence, with respect to the agreed preliminary issue, it should not be argued, be it on the evidential basis of the agreed documents and or admitted facts, that the 3rd defendant had authority or would have had authority to enter into the said impugned consent orders, and or that the 3rd defendant was *ad idem*. Given the terms of the agreed preliminary issue, the want of authority is to be assumed, and the want of authority must stand to be so assumed, notwithstanding the fact that it was conceded by Mr. Periasamy that the plaintiff was present in court when the order dated 23 September 1995 in Muar 24-268-93 was pronounced. Given the terms of the agreed preliminary issue as framed, there is no question of fact to be resolved, and all argument that the 3rd defendant was *ad idem*, which is a question of fact, could be not heard in the trial of the aforesaid agreed preliminary issue.

Shorn of the assumed fact, the agreed preliminary issue reads "is the absence of authority sufficient ground in law to set aside or nullify those said orders". Those said orders were orders given by consent. Those said orders were not orders which embodied provisions to which the parties had not objected. On the face of it, those said orders were consent orders in the true technical sense. A distinction should be drawn. In *Siebe Gorman & Co. Ltd v. Pneupal Ltd* [1982] 1 All ER 377, 380, Lord Denning MR said:

> We have had a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v. Nicholson* [1942] 2 All ER 315 at 317, [1942] 2 KB 321 at 324. One meaning in this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without objection?

And indeed, there is a host of local authorities saying that the court only will interfere with a consent order (one in the true technical sense) on the same grounds as it would with a contract or except for reasons sufficient to set aside a contract (see for example, *Richard Lau Ming Hing v. Bank Pembangunan Malaysia* [1994] 2 CLJ 849, 853; *Yap Chee Meng v. Ajinomoto supra*, 251; *Tio Chee Hing v. Tractors Malaysia Bhd, supra*, 67; *Tong Lee Hwa & Anor v. Chin Ah Kwi supra*, 79; *Khaw Poh Chhuan v. Ng Gaik Peng & Ors, supra*, 783), such as, for example, fraud, undue influence, misrepresentation, or mistake.

There is a greater number of Commonwealth authorities saying the same (for example, see the authorities listed in the 1997 Supreme Court Practice [4607]; *Udiljak v. Udiljak* (Supreme Court, Christchurch M 216/79. 18 December 1979; *Cannan v. Reynolds* [1856) 5 El & Bi 301, 119 ER 493; *Purcell v. FC Trigell Ltd* [1970] 3 All ER 671, 676; *Tioner-Roche & Co. (London) Ltd v. Spiro* 17 June 1982; *Wembley Laboratories Ltd v. Joyce Ground Engineering Ltd* QBD (Official Referees' Business) 19 Con LR 143), the most oft-quoted, it would seem, being *Huddersfield Banking Company Ltd v. Henry Lister & Sons Ltd* [1895] 2 Ch 273.

Two local authorities, namely *Leow Seng Huat v. Low Mui Yein*, and *Lee Teng Huat v. Lee Geok Thye*, were cited in support of the proposition that counsel's lack of authority is not a ground to set aside a consent order. In *Leow Seng Huat v. Low Mui Yein*, a proceeding by a husband to commit his wife to prison, the husband alleged that his wife had disobeyed a consent order. The wife contended that she was not bound by the consent order as she had never authorised her former counsel to agree to the order. In connection with the issue "whether the wife was bound by the consent order as she had never, in the first place, authorised her former solicitor En See to agree to the consent order", it was held:

With respect, on this issue, I agree with the submission of learned counsel for the plaintiff, En CE Chuah, that it is irrelevant whether or not En See, in agreeing to the consent order, had acted in accordance with the defendant's instruction or otherwise. Assuming that it is true that the defendant had never authorized her former counsel, En See, to agree to the consent order, that however, is a problem to be trashed out only between the defendant and her counsel: such lack of authorization cannot affect the interest of a third party, the plaintiff. It is a principle of law that a party is entitled to rely on the apparent authority of the counsel of the opposing party to compromise: *Waugh v. HB Clifford & Sons Ltd* [1982] 1 All ER 1095. Therefore, En See, being the defendant's duly appointed counsel at the material time, had the apparent authority to compromise and the plaintiff's counsel was entitled to rely on such ostensible or apparent authority when agreeing to the consent order.

In *Lee Teng Huat v. Lee Geok Thye*, a company winding up proceeding, the winding up petition was opposed by the respondent and six opposing contributories. Recorded was a consent order allowing the petitioner to withdraw the petition with liberty to file afresh and providing for the sale of certain assets by the petitioner to the respondent and to the opposing contributories. Two contributories applied by motion to set aside that part of the consent order requiring them to purchase the said assets. In connection with the issue raised by those two contributories that their instruction to the solicitor was limited, merely to oppose the petition, and that their solicitor was not authorised to enter into consent orders, it was held:

The applicants' complaint of alleged lack of authority of their counsel and solicitor is without substance, as there is no affidavit from their counsel, solicitor, respondent or other contributories as to the lack of or for misapprehension of his authority (see *Lewis v. Lewis* (890) 45 Ch D 281). And, the fact that negotiation took place over a period of three days clearly showed that all the contributories had authorized their counsel and solicitor to negotiate and conclude a settlement. Counsel and solicitor in the ordinary course of their retainer have the power to enter into compromise or settle disputes (see *Sourendra Nath Mitra & Ors v. Tarubala Dasi* [1930] 57 Indian Appeals 133 at pp 138, 139-140, 141, 142 per Lord Atkin; *Teh Eok Kee & Anor v. Tan Chiah Hock & Anor* [1996] 2 CLJ 227). In the course of his judgment in *Waugh v. HB Clifford & Sons Ltd* [1982] Ch 374, Brightman LJ reviewed a number of the authorities referred to in the foregoing discussion on implied authority and said this (at p 387):

> The law has become well established that the solicitor or counsel retained in an action has an implied authority as between himself and his client to compromise the suit without reference to the client, provided that the compromise does not involve matters 'collateral to the action'; and ostensible authority, as between himself and the opposing litigant to compromise the suit without actual proof of authority, subject to the same limitation ...

Thus, counsel's alleged lack of authority is invariably never a ground to set aside a consent order or a contract. Any injustice suffered by the client could be resolved in the context of a claim against his counsel (see *Waugh v. HB Clifford & Sons Ltd; Leow Seng Huat v. Low Mui Yein* [1996] 5 MLJ 381, at p 385E-H). There is no obligation to prove express authority. A solicitor or counsel by implication had authority to compromise. The petitioner and the court, are entitled to assume the existence of authority when the lack of authority is not specifically brought to the attention of the petitioner or the court at that material time.

In both *Leow Seng Huat v. Low Mui Yein* and *Lee Teng Huat v. Lee Geok Thye*, it was contended by the applicants seeking to set aside the consent order that counsel had no authority to enter into the consent order, and in both cases it was held by the court that the absence of authority is not a ground to set aside a consent order. In both cases it was held that the consent order shall stand, and that the absence of authority is strictly a matter between client and counsel. In both cases, *Waugh v. HB Clifford & Sons Ltd* was relied upon as authority that counsel would have had implied authority. But implied authority and hence *Waugh v. HB Clifford & Sons Ltd* could not be taken into account. By the terms of the agreed preliminary issue, it is to be assumed, *ex hypothesi*, that "the 3rd defendant had no authority to enter into the aforesaid consent orders dated 24 March 1993, 23 July 1994, and 23 September 1995". Also by the terms of the agreed preliminary issue, the court is required to answer the issue "on the assumed basis that the 3rd defendant had no authority to enter into the aforesaid consent orders dated ... ". Implied authority has been ousted by the terms of the agreed preliminary issue. Quintessentially, the issue is whether the absence of authority is a ground sufficient to set aside a consent order. And that issue should not take much effort to answer, if it were indeed that set and that absolute, that the absence of authority is never a ground sufficient to set aside a consent order, as was held in *Leow Seng Huat v. Low Mui Yein* and *Lee Teng Huat v. Lee Geok Thye*.

But is it that set and that absolute that the grounds for setting aside a consent order are strictly limited to the grounds for the setting aside of a contract (seemingly equating a consent order with a contract, which it is not, see 1997 Supreme Court Practice [4608]), *albeit* that the authority of counsel is not of any consequence in the case of a contract which is made by the contracting parties themselves, but is eminently pertinent in the case of a consent order which is almost always, if not invariably, pronounced with the consent given only by counsel.

There are explicit views to the contrary that the court has an inherent jurisdiction to set aside a sealed order obtained without authority, if the interests of justice require it.

With respect to both procedure, and the grounds for setting aside, the general principle is that a consent order once sealed cannot be set aside by the court of first instance in the original action, but may be set aside in a fresh action brought for that purpose. "Once a consent judgment or order has been entered or passed, it cannot be set aside by the court of first instance in the original action, even if it was entered or passed by mistake, but it may be set aside or extended or altered with the consent of all the parties, provided that to do so will not prejudice a third person. It may be set aside in a fresh action brought for that purpose on any ground which may invalidate the agreement on which it is founded" (*37 Halsbury*, 4th edn para 390). "It is well established that a perfected consent order can only be set aside in a fresh action filed for that purpose; see eg *Huddersfield Banking Ltd v. Henry Lister & Sons* [1895] 2 Ch 273" (*Khaw Poh Chhuan v. Ng Gaik Peng & Ors. supra*, at 782, per Peh Swee Chin FCJ). Two exceptions are where there has been a slip in drawing up the order which was entered and where there has been an error in expressing the manifest intention of the court (*Paper Machinery Ltd et al v. Ross Engineering Corp et al* [1934] 2 DLR 239) (for precedents on consent given mistakenly, see *Cannan v. Reynolds* [1856] 5 El & BI 301, *Re Australian Direct Steam Navigation Co. Miller's Case* [1876] 3 Ch D 661, *Mullins v. Howell* [1879] 11 Ch D 763, *Ainsworth v. Wilding* [1896] 1 Ch 673) (see also *Oley and Moffat v. City of Frederiction* [1983] 50 NBR (2d) 196, where the New Brunswick Court of Appeal refused to limit the scope of the exceptions to the general rule by any exhaustive definition).

Absence of consent was held as an exception to the general rule in *Stewart v. Complex* [1990] 107 NBR 407, where Paul S. Creaghan J said:

> I am persuaded that there is inherent jurisdiction in a court of first instance to set aside a consent order that it has made and which has been entered where it is clearly shown that a party did not in fact consent to the order granted. The foundation upon which the order is made is the consent of the parties and where it is clearly established that the consent held out to the court had not been given, the court can set aside its order as failing to express its intention.

In *Waitemata City Council v. MacKenzie* [1988] 2 NZLR 242, 249, per Casey J, the New Zealand Court of Appeal said:

> ... I am disposed to accept that the Court ... does have an inherent jurisdiction to set aside a sealed consent order obtained without authority or as a result of a mistake if the interests of justice require it. While there are obvious reasons for upholding the indefeasibility of such orders, it seems unnecessary to go to the extreme limit of regarding them as absolutely inviolate (apart from the 'slip rule'); to do so could transform procedures designed to further the ends of justice into instruments of injustice or oppression. So long as the rights of others have not been materially prejudiced, I can see no virtue in

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> the formal operation of sealing sufficient in itself to constitute a bar to any prospect of restoring the parties to the position they should have been in all along.
>
> Whatever the grounds for seeking to set aside the order, the ultimate question is whether such a step is called for in the interests of justice, having regard to all the circumstances of the case.

b

Marsden v. Marsden was an instance where the court of first instance set the sealed order aside. But the court was careful to point out in *Marsden* that it was a case which turned on its own special facts, in that the plaintiff took out the order only for the purpose of applying to have it set aside (see *Marsden* at 1166). That *Marsden* was a special case was noted in *Stewart v. Complex*, and in *Khaw Poh Chhuan v. Ng Gaik Peng* at 783, where the Federal Court remarked "By the way, this case ... seems to be an exception on its own facts to the rule ...").

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In the next paragraph, Peh Swee Chin FCJ further remarked:

> This case shows that even if lack of consent was unknown to the other side, the court has the power to interfere with such a consent order where grave injustice would be caused by allowing the consent order to remain.

e

Grave injustice as a consideration for setting aside is not recent. In *Neal v. Gordon Lennox* [1902] AC 465, the appellant brought an action for slander and libel against her aunt, alleging that the defendant had made serious imputations against the plaintiff's character. The plaintiff authorised her counsel to consent to a reference on condition that all imputations on her character were publicly disclaimed in court. Her counsel, who did not make this limitation of his authority known to the defendant's counsel, agreed with the latter to refer the action without any disclaimer of imputations. Before the order was perfected the plaintiff took steps to set it aside. It was held that counsel had exceeded his authority, with the result that the plaintiff was entitled to have the agreement to refer set aside. The House of Lords gave unanimous opinion, and said as follows:

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> ... to suggest to me that a Court of justice is so far bound by the unauthorized act of learned counsel that it is deprived of its general authority over justice between the parties is, to my mind, the most extra-ordinary proposition that I ever heard ... Where the contract is something which the parties are themselves by law competent to agree to, and where the contract has been made, I have nothing to say to the policy of law which prevents the contract being undone: the contract is by law final and conclusive. But when two parties seek as part of their arrangement the intervention of a Court of justice to say that something shall or shall not be done, although one of the parties to it is clearly not consenting to it, but has in the most distinct form said that the consent to refer – to take it from the jurisdiction of the ordinary

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tribunal – shall only be on certain terms, to say that any learned counsel can so far contradict what his client has said, and act without the authority of his client as to bind the Court itself, is a proposition which I certainly will never assent to (at 470, per the Earl of Halsbury LC).

The order is good on the face of it, and the learned judge who made it was perfectly justified in making it, having regard to the evidence before him. But before that order is drawn up one of the parties interested discovers that it is made without her consent at all, and not only without her consent, but in spite of her express instruction. Now, I venture to say that if that had happened in the Chancery Division, with the practice of which I am familiar, it would have been a matter of course for the learned judge who made that order to stay the drawing of it up if he had been informed that the Court had inadvertently made the order upon the assumption that the parties were consenting when in fact they did not consent (at 473, per Lord Lindley).

That grave injustice should be the key consideration was also advanced in *3 Halbury's* 4th edn, para 1182:

The position is more uncertain where the authority of counsel is limited, but the limitation is unknown to the other side, who enter into the compromise believing that the opponent's counsel has the ordinary unlimited authority. In some cases, where the matter is within the ordinary authority of counsel, the courts have refused to inquire whether there was any such limitation, when it was not communicated to the other side, and have refused to set aside a compromise entered into by counsel.

But the true rule seems to be that in such case the court has power to interfere; that it is not prevented by the agreement of counsel from setting aside or refusing to enforce a compromise; that it is a matter for the discretion of the court; and that when, in the particular circumstances of the case, grave injustice would be done by allowing the compromise to stand, the compromise may be set aside, even although the limitation of counsel's authority was unknown to the other side, or where clear and unequivocal instructions of limitations have been given. It may be, however, that the court will not interfere on this ground if the settlement or compromise has been embodied in an order of the court which has been perfected.

The court will not interfere on the ground that a consent order once sealed cannot be set aside by the court of first instance in the original action, on account of procedure. But this action is a fresh action, and the issue that the said consent orders had been perfected and that the court should not therefore interfere is a non-starter. The pertinent issue is whether the absence of authority is a ground for the setting aside of a consent order. And from the above survey of the authorities, be it at first instance as in *Marsden v. Marsden* and *S.K. Pakianathan v. R.K. Stallard*, or be it in a fresh action, it is clear that the authority of counsel or want of it, is good ground for the setting aside of a

consent order. *Camden London Borough Council v. Medhurst* (Chancery Division) 3 May 2001 (where the consent order, in so far as made on the basis that the Legal Services Commission had agreed to it and was therefore bound, was set aside, as the Legal Services Commission had not represented or held out to Camden that counsel for Medhurst had authority to bind the Commission) is a recent instance on point. The agreed preliminary issue is therefore answered in favour of the plaintiff. Further, it is ordered that all pleaded issues be tried.